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In the Supreme Court
of the United States

OCTOBER TERM, 1956
No. 204

WILLIAM BENZ, et al, Individually and as Representative of All of the Members of the SAILORS' UNION OF THE PACIFIC,

M. D. MACRAE, et al, Individually and as Representatives of All of the Members of Local 90 of the NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL,

JEFF MORRISON, et al, Individually and as Representative of All of the Members of ATLANTIC AND GULF DISTRICT, SEAFARERS' INTERNATIONAL UNION, AFL,

Petitioners,

vs.

COMPANIA NAVIERA HIDALGO, S. A., a corporation,

Respondent.

PETITIONERS' REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ARGUMENT

I.

The National Labor Relations Act as amended governs picketing of a foreign vessel by an American Union at an American Port.

The judgments allowed by the courts below for damages against the petitioners on account of the peaceful picketing of the respondent's vessel were based upon the law of the State of Oregon. Apparently the law of Oregon was applied because the conduct which the courts found to have been tortious was carried on in the State of Oregon. The respondent in its brief contends that the state law should be applied rather than the federal law, notwithstanding the preemption by the federal law of the field of labor relations in interstate and foreign commerce, because "the dispute underlying these cases is entirely foreign in nature." (p. 10 Resp. Br.)

As we pointed out in our opening brief, the foreign aspect of the dispute might invite a choice of foreign law but can not govern a choice between state and federal law. The respondent in its brief argues "that our law was not intended to grant them rights to so intervene in the internal economies of foreign vessels." (p. 14 Resp. Br.)

If these cases merely involved the "internal economies of foreign vessels" then the controversy would be governed neither by the law of the State of Oregon nor the law of the United States, but would be governed by the law of the flag of the vessel. The SS RIVIERA was a Liberian flag vessel. A treaty between the governments of the United States and Liberia, provides that Consular officers of Liberia shall have exclusive jurisdiction over controversies arising out of "the internal order of private vessels of his country." 54 Stat. 1751. (Set out as Apendix A).

If the dispute, as respondent argues, merely involved

the "internal economies of foreign vessels," the respondent had a complete remedy under the provisions of the treaty through the Liberian Consul. The Consul's jurisdiction is exclusive, and the courts rendering the judgments in these cases would have been without jurisdiction over the controversy. See THE WIND (DCPA, 22 F Supp 883; *Petition of Georgakopoulos*, 81 F Supp 411, 175 F2d 730 (1949) (CA 4). Thus if the respondent's argument is followed to its logical conclusion, both the state and federal law would be preempted by the foreign law and the jurisdiction of the court would be superseded by the jurisdiction of the Consul under the treaty and the judgments herein rendered nullities.

Also if it is assumed that the National Labor Relations Board does not have jurisdiction over the employer either because it is a foreigner or for some other reason, it does not follow that such employer is prevented from seeking relief through the Board or through the courts under the provisions of the Labor-Management Relations Act on account of picketing which may be in violation of the Act. As we pointed out in our opening brief, this court has so held recently in *Local Union No. 25 v. New York, New Haven and Hartford R. R. Co.*, 350 US 155, 76 S Ct 227 (1956).

The respondent in its brief did not even attempt to answer our point on the application of this latter case. Apparently the respondent realized that even though it may not be subject to the jurisdiction of the National Labor Relations Board because it is a foreigner, that

nevertheless it could avail itself of the remedies provided for through the Board for an injunction or through the courts for damages under the Act.

Finally, the cases relied upon by the respondent on page 12 of its brief concerning the applicability of the federal statutes to acts done in foreign countries are not in point. The acts complained of in the cases at bar were all done ashore in the United States. It was conduct carried on in interstate and foreign commerce. The determination of the lawfulness of the conduct should be made under the federal Act, which has preempted the field of labor management relations. The fact that the party seeking the remedy is a foreigner cannot in any event allow the choice of state law.

II.

The pre-emption by the Labor-Management Relations Act 1947 is not altered in these cases by the fact that the employees involved were seamen.

The respondent also contends in its brief that the jurisdiction of the court below to apply state rather than federal law in awarding damages for the peaceful picketing in these cases is sustained because of the supremacy of the maritime law over general labor legislation. Like respondent's contention with respect to the foreign nature of this dispute, the point with respect to the maritime law entirely begs the question of preemption of the state by the federal law in the field of labor relations in interstate and foreign commerce.

The facts in the case concerning the application of the maritime law might be considered by either the National Labor Relations Board or by a federal court in an action under the Act in determining whether or not the petitioners' conduct was protected concerted activities under the provisions of the Act. But the facts in the case involving maritime law would not divest either the Board or the federal court in an action under the Act of jurisdiction to hear and determine the controversy. In any event the maritime aspects of the case cannot be the basis of retention of jurisdiction by a state court or a federal court in a diversity case to apply state law in the determination of a labor dispute occurring in interstate commerce.

In an attempt to inject the maritime law into the case, the respondent in its brief does violence to the court's findings of fact by stating that "the picketing was one continuous chain of activity, starting simultaneously with the sit-down strike." (p. 22 Resp. Br.) and that "petitioners were not picketing for themselves, but as the uncertified representatives of former members of the RIVIERA'S crew." (p. 2 Resp. Br.) It must be remembered here that the petitioners are not the former crew members. They are members of various American seamen's unions. The damages were awarded for picketing beginning on October 14, 1952. (R. 244.) The court found that on October 14, 1952, the members of the Sailors' Union of the Pacific "acting pursuant to a resolution duly adopted by said union commenced picketing said vessel and continued to picket it until restrained

and enjoined from further picketing by the court on November 26, 1952." (R. 241.) The resolution which is set out in full on page 416 of the record, makes no demand for the rehiring of the former crew members. On the other hand the resolution points out clearly that the respondent "is paying wages of less than one-third the amount which the American shippers are paying, and * * * is taking away business from American operated ships * * *." The resolution also, after describing the conditions aboard the SS RIVIERA stated that the respondent "is unfair to the Sailors' Union of the Pacific and other legitimate seamen's unions all over the world." The resolution called for picketing of the vessel and publicity of a dispute.

The time table of events set out as part of our statement of the case in our opening brief, page 7, clearly illustrates that the petitioners were not parties to the original strike and picketing. Indeed the District Court found that the petitioners did not induce the crew members to go on strike. (R. 451 and 455.) The petitioners did not enter into the dispute until October 14, 1952 when they began picketing "pursuant to the resolution."

When the petitioners began picketing there were twenty-five jobs for seamen open on the vessel (R. 21.) The ship was lying idle and the respondent was seeking a crew to operate its vessel in a trade and commerce in which the petitioners and their fellow union members were employed. (R. 20.) The picketing by the petitioners did not and could not have caused the breach of any

articles. It could not have caused or induced mutiny or desertion or any other violations of the maritime law.

As we pointed out in our opening brief, the cases relied upon by the respondent merely hold that a crew of a vessel serving under articles may not go on strike without being guilty of mutiny. *Rees v. U. S.*, (CCA-4 1938) 95 F2d 784. And that the discharge of crew members who are under articles and refuse to work and go on strike does not constitute an unfair labor practice. *Peninsular & Occidential S S Co. v. NLRB*, (CCA-5 1938) 98 F2d 411. And finally, that where an employer has committed an unfair labor practice the Board may not order reinstatement of employees who have committed mutiny or engaged in a sit-down strike. *Southern S S Co. v. NLRB* (1942) 316US 31, 62 S Ct 886, 86 L Ed 1246; *NLRB v. Fansteel Metalurgical Corporation*, 306 US 240, 58 S Ct 490, 83 L Ed 627.

None of the cases cited by respondent involved the situation presented in the cases at bar. The cases did not involve picketing or damages for picketing, but merely involved the question of whether or not the National Labor Relations Board in making reinstatement provisions should give the seamen or other workmen affirmative relief after they had themselves committed wrongful acts. The cases do not hold that the seamen's wrongful conduct while under articles thereafter permanently bar him or his representatives from the processes of collective bargaining or from the exercise of protected concerted activities under the Act.

In conclusion the most that can be said concerning the effect of the maritime law on the question of pre-emption involved in these cases is that the National Labor Relations Board or the federal court in an action under the Act might consider the points of contact with maritime law in determining whether or not the picketing constituted protected conduct under the Act. The existence of facts involving maritime law would not divest either the Board or the federal court of jurisdiction to hear and try this labor controversy involving interstate commerce. The fact that the maritime law might be involved is no basis for the application of state law rather than federal law.

III.

The Labor-Management Relations Act 1947 has provided the exclusive remedies for damages for peaceful picketing in interstate commerce.

It is respondent's final contention that the Labor-Management Relations Act, 1947 does not provide it with a remedy in damages, and that therefore the "common law" remedy in damages under the state law is allowable because it is "not inconsistent with the Act." It is the respondent's theory a state court should be allowed to make the determination of the question of what is protected conduct as defined under Section 7 of the Labor-Management Relations Act rather than allowing the determination to be made by the Board or by a court in a proceeding brought under the Act. Allowing

state courts to so interpret the provisions of the federal act would, of course, result in a variety of decisions. This court has uniformly held that the remedies and procedures provided for under the Act are exclusive.

The district court found that the picketing by the petitioners "was intended to prevent the repairing and loading of the SS RIVIERA * * *" in order to induce the employees of independent contractors to refuse to work on the respondent's ship in order to force the independent contractors to cease doing business with respondents for the purpose of requiring the respondent to reemploy its former crew members. Nevertheless the respondent in its brief stated that the picketing "was not a prohibited secondary boycott but primarily picketing." If it was not a prohibited secondary boycott but merely primary picketing it was then conduct protected under the Act.

In the alternative respondent further argues that if it were a secondary boycott that it would have no remedy against petitioners who are individuals because Section 303 of the Act refers only to damages against "any labor organization." Respondent therefore concludes that since there is no remedy against the individual petitioners under the Act but only against their labor organization, that therefore under the authority of the *Laburnum* case that the "common law remedy for damages must be applied."

Congress in enacting the Labor-Management Relations Act, 1947, and in allowing damages against labor

unions for certain conduct provided that the injured party may sue for his damages "subject to the limitations and provisions of Section 185 of this title * * *." Title 29 USCA Sec. 187, 61 Stat 158.

Title 29 USCA Sec. 185, 61 Stat 156 provides in part as follows:

> "Any such labor organization may sue or be sued as an entity and in behalf of employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets."

It was obviously the intention of the Congress to provide a remedy in damages exclusively against the labor organization as an entity and not to allow a remedy in damages against individuals for labor conduct not involving actual or threatened violence.

Recently Judge Parker of the Fourth Circuit in *Friendly Society of Engravers v. Calico Engraving Co.*, 238 F2d 521 (CCA-4 1956) in holding that a labor union could not recover in damages under the common law against an employer for wrongful labor conduct except by proceeding under the Labor-Management Relations Act, 1947, said:

> "The National Labor Relations Act and the Labor Management Relations Act, however, provided exclusive remedies for the protection of the rights thus recognized; and the parties complaining of the violation of such rights may not go into court for their

> vindication but m st pursue the remedies that the acts provide. Amazon Cotton Mill Co. v. Textile Workers Union of America, 4 Cir., 167 F2d 183, 186."

and after holding that the Laburnum case was not to the contrary, concluded:

> "As pointed out above where the statute which forbids it provides at the same time a remedy for its redress without providing a right of action in the courts, the remedy so provided is exclusive. To allow actions at law to be maintained with respect to unfair labor practices which do not give rise to actions at common law, would not only burden the courts with a flood of unnecessary litigation, but would hamper the National Labor Relations Board in the performance of the duties confided to it and would breed endless confusion in labor litigation. Nothing of the sort was intended by Congress; and for the courts to sanction such litigation would retard and not advance the purposes for which the National Labor Relations Act came into being."

The fact, if it be one, that the remedy for damages allowed by the state court is not inconsistent with the Act is immaterial, because the remedy provided for by the Act is exclusive. The issues of whether or not the picketing is primary or secondary, whether it is protected under the provisions of the Labor-Management Relations Act, 1947, or prohibited by it, are all issues to be determined by proceedings under the remedies afforded under the Act.

The conduct involved in the cases at bar was peaceful picketing. Such conduct does not constitute a common law tort such as assault or trespass. Whether or not peaceful picketing is wrongful or tortious conduct depends

upon the applicable labor relations law. When such picketing is carried on in interstate commerce it is exclusively governed by the federal law and the state may not attempt to interpret the federal law and provide a remedy in damages.

CONCLUSION

Since these cases involve peaceful picketing in interstate commerce, there was not involved the commission of common law torts for which a remedy in damages might be reserved under the state law. Whether or not the peaceful picketing constituted wrongful or tortious conduct depends upon the applicable labor law. The remedy for damages provided for under the Labor-Management Relations Act, 1947, constitutes the exclusive remedy for damages on account of peaceful picketing in interstate commerce. The controversy must be determined in a proceeding under the Act and cannot be determined by a state court or a federal court in a diversity case applying state law. The circumstances in the cases relating to the fact that the employer was a foreigner and the fact that seamen were involved might at most go to the question of whether or not the picketing was conduct protected by the provisions of Section 7 of the Act. Those circumstances do not prevent the preemption of the field by the Federal Labor Relations Law nor give jurisdiction to a state court for the application of state law.

This court should reverse the judgments of the Court of Appeals for the Ninth Circuit and the judgments of

the United States District Court for the District of Oregon, and respondent's actions herein should be dismissed.

Respectfully submitted,
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